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ABSTRACT

This document contains information relating to the 1987 Wisconsin State Senate Bill 203 which reorganizes existing crimes against children located throughout the criminal code into a separate chapter of that code relating solely to crimes against children. Part I explains key provision of the bill, noting that the bill would restate the child victim age categories in the sexual assault statute, revise several existing crimes against children, expand some current statutes, and create some new crime classifications. Part II describes committee activity, including assignment, summary of meetings, committee and council votes, and staff materials. Part III provides a description of the 1987 Senate Bill 203, giving the bill's background and explaining the six major provisions of the bill: (1) child abuse; (2) sexual offenses; (3) adult responsibilities; (4) abduction and custody; (5) regulatory offenses; and (6) limitations. Part IV gives committee recommendations for revisions in the general obscenity statute, the definition of "sexual contact" and the penalty for controlled substances violations, and privacy protection for child victims. Committee materials are appended. (NB)

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WISCONSIN LEGISLATIVE COUNCIL
REPORT NO. 7 TO THE 1987 LEGISLATURE

ED289139

CG 020406

LEGISLATION ON CRIMES AGAINST CHILDREN

1987 SENATE BILL 203, RELATING TO CRIMES AND CIVIL OFFENSES AGAINST CHILDREN AND PROVIDING PENALTIES

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(1) Resigned from the Committee on November 17, 1986.

WISCONSIN LEGISLATIVE COUNCIL
REPORT NO. 7 TO THE 1987 LEGISLATURE*

LEGISLATION ON CRIMES AGAINST CHILDREN

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PART I

KEY PROVISIONS OF 1987 SENATE BILL 203

1. Reorganizes existing crimes against children currently located throughout the Criminal Code {chs. 939 to 948} into a separate chapter of the Criminal Code {new ch. 948}, relating solely to crimes against children.

2. Restates the child victim age categories in the sexual assault statute and creates a new provision that recognizes that a person responsible for the welfare of a child has a duty to protect that child from sexual assault by others {s. 948.02 (1), (2) and (3)}.*

3. Revises the crime of child abuse to: (a) apply to any victim under 18 years of age (currently, the crime applies to victims under 16 years of age); (b) prohibit the intentional or reckless causation of bodily harm to a child; (c) prohibit the causation of emotional harm to a child; (d) prohibit the failure of a person responsible for the welfare of a child to take action to prevent bodily or emotional harm to the child; (e) allow for increased penalties depending on the nature of the offender's action and the amount of harm inflicted; and (f) create a penalty enhancer of up to five years additional imprisonment if the abuse is committed by a parent or other person responsible for a child's welfare {ss. 948.03 and 948.04}.

4. Revises the current defense to crimes against children, based on a privilege to discipline children, to recognize that: (a) the privilege exists only for reasonable discipline; (b) reasonable discipline includes only such force as a reasonable person believes is necessary; and (c) it is never reasonable discipline to use force which creates an unreasonable risk of great bodily harm or death to the child {s. 939.45 (5)}.

5. Expands the scope of the current sexual exploitation of children statute to prohibit the possession of a film, photograph, videotape or other pictorial reproduction of a child engaged in sexually-explicit conduct and eliminates "knowledge of the age of the child" as an element of the current child sexual exploitation statute, but recognizes "reasonable cause to believe that the child was 18 years of age or older" as an affirmative defense {ss. 948.05 and 948.12}.

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*Throughout this Part of the Report, the bracketed statutory references are to statutes revised or created in 1987 Senate Bill 203.

6. Expands the incest statute to include, in the case of a child victim: (a) relation by adoption, in addition to relation by blood; (b) sexual contact, in addition to sexual intercourse; and (c) a "failure to act to prevent incest" provision {s. 948.06}.

7. Revises the child enticement statute to substitute, for the vague language of the current statute, a specific list of intended unlawful enticement purposes and remove the current age limitation, which provides that only persons 18 years of age or older may be charged with and convicted of child enticement {s. 948.07}.

8. Creates a new crime prohibiting a person from exposing a sex organ to a child for the purpose of sexual arousal or gratification, without requiring that the act be done publicly or indecently {s. 948.10}.

9. Revises the crime of exposing a child to harmful material to: (a) establish two penalty levels for the crime, depending on whether the harmful material is transferred to a child or possessed with the intent to transfer to a child; (b) eliminate the civil declaratory judgment provision in the current statute; and (c) substitute the standards for determining whether or not material is obscene, which have been recognized by the U.S. Supreme Court, for the defective standards in the current statute {s. 948.11}.

10. Makes the abandonment of a child statute applicable to all children, rather than only to children under the age of six years as under current law {s. 948.20}.

11. Establishes two penalty levels for the crime of abduction, depending on whether force or threat of force was an element of the offense, and makes other clarifying changes {s. 948.30}.

12. Revises the interfering with custody statute to: (a) make all offenses recognized under the statute applicable to all children, regardless of age; (b) eliminate the requirement under several provisions that the child must be taken or enticed outside of the state before a violation can occur; (c) expand the defenses to the crime to include protecting the child from imminent danger of sexual assault; and (d) permit a child to be taken into and held in physical custody for a certain period of time if there is probable cause to believe that the child is in danger of being a victim of a custody interference offense {s. 948.31}.

13. Specifies a higher penalty for violation of the statute relating to contributing to the delinquency or neglect of a child, if the delinquent act contributed to would have been a felony if the child were an adult and revises the statute to expressly state that the person responsible for the welfare of a child may contribute to the neglect or

delinquency of a child by his or her failure to take action, as well as by his or her actions {s. 948.40}.

14. Expands the scope of the prohibition against the possession of a pistol by or transfer of a pistol to a child, to apply to certain other dangerous weapons, in addition to pistols (e.g., martial arts weapons) {s. 948.60}.

15. Creates a new crime prohibiting any person from knowingly possessing or going armed with a dangerous weapon, including any firearm and certain specified martial arts weapons, on school premises, unless a specific exception applies {s. 948.61}.

16. Subjects a person who delivers controlled substances to a person, who is 18 years of age and at least three years younger than the defendant, near school grounds to the same penalty enhancement as is currently applicable to the delivery of cocaine near a school building (i.e., an increase of up to five years in the person's prison term) {s. 161.49}.

17. Creates an extended statute of limitations for victims of crimes of incest, child abuse, sexual assault, sexual exploitation of a child and solicitation of a child for prostitution, which allows criminal prosecution to be brought within six years after the alleged offense or by the time the victim reaches the age of 21, whichever period is longer {s. 939.74 (2) (c)}.

PART II

COMMITTEE ACTIVITY

A. ASSIGNMENT

The Legislative Council established the Special Committee on Crimes Against Children by an April 15, 1986 mail ballot, based on a February 12, 1986 letter from Senator Barbara Ulichny, calling for a review and reorganization of laws relating to crimes against children. The Special Committee was directed by the Legislative Council to examine state laws relating to crimes against children to:

(a) Evaluate whether it is advisable to reorganize these laws into a separate chapter of the statutes; and

(b) Review these laws to address any major policy issues relating to crimes against children.

The Legislative Council directed the Special Committee to report to the Council by December 31, 1986.

The Chairperson of the Special Committee was appointed by an April 15, 1986 mail ballot. The members, appointed by a June 17, 1986 mail ballot, consisted of two Senators, seven Representatives and seven Public Members (one Public Member resigned from the Special Committee on November 17, 1986). During 1986 and 1987, the Special Committee held eight meetings at the State Capitol in Madison, on the following dates:

July 24, 1986	November 18, 1986
August 29, 1986	December 16, 1986
September 18, 1986	January 7, 1987
October 8, 1986	January 21, 1987

B. SUMMARY OF MEETINGS

At the July 24, 1986 meeting, the Special Committee reviewed a staff paper providing background information on the study (Information Memorandum 86-20) and Discussion Paper 86-1A, relating to crimes against children involving physical and psychological abuse. The Special Committee also heard from several invited speakers, including representatives of the University of Wisconsin-Madison Law School who were involved in a two-year study project which resulted in a preliminary draft

proposal to revise and reorganize current state statutes relating to crimes against children.

At the August 29, 1986 meeting, the Special Committee reviewed discussion papers, prepared by staff, relating to crimes against children involving physical and psychological abuse and sexual morality (Discussion Papers 86-1A and 86-1B). During the course of the review of these Papers, the Special Committee adopted preliminary drafting instructions for revision of the various statutes covered in these Papers.

At the September 18, 1986 meeting, the Special Committee continued its review of Discussion Paper 86-1B relating to crimes against children involving sexual morality. Based on this review, the Special Committee adopted preliminary drafting instructions for the preparation of drafts revising the criminal statutes covered in this Paper.

At the October 8, 1986 meeting, the Special Committee reviewed Discussion Papers 86-1C, 86-1D and 86-1E, relating to crimes against children involving physical neglect, interfering with custody and contributing to the delinquency of a minor. The Special Committee also began its review of a letter and attachments from then Attorney General Bronson C. La Follette, dated October 6, 1986, relating to obscenity. Based on its review of the Discussion Papers, the Special Committee adopted preliminary drafting instructions for the preparation of drafts revising the current statutes addressed in the Discussion Papers.

At the November 18, 1986 meeting, the Special Committee reviewed the exposure of minors to harmful materials statute and the general obscenity statute, as described Discussion Paper 86-1B, relating to crimes against children involving sexual morality. The Special Committee also heard from an assistant attorney general, regarding the constitutional and other issues associated with the current general obscenity statute and the exposure of minors to harmful materials statute. The Special Committee reviewed Discussion Paper 86-1F, relating to regulatory offenses directed at children, which was prepared by staff. The Special Committee also reviewed a memorandum, prepared by Committee Member Daniel R. Moeser, Circuit Judge, relating to general and affirmative criminal defenses. Based on the review of these materials, the Special Committee adopted preliminary drafting instructions for the preparation of a draft to revise the current exposure of minors to harmful materials statute. The Special Committee also directed the staff to draft a motion, for consideration at a subsequent meeting, recommending to the full Legislative Council and the leadership and standing committees in both houses, that the Legislature enact the general obscenity statute consistent with recent decisions of the U.S. Supreme Court.

At the December 16, 1986 meeting, the Special Committee continued its review of Discussion Paper 86-1F, relating to regulatory offenses directed at children and the memorandum, prepared by Judge Moeser, relating to general and affirmative criminal offenses. Based on this review, the Special Committee adopted drafting instructions for the preparation of drafts to revise current statutes relating to regulatory offenses directed at children. Also, at this meeting, the Special Committee reviewed and took preliminary action on draft proposals: revising current statutes relating to the privilege to discipline children; child abuse; sexual exploitation of children; and sexual assault.

At the January 7, 1987 meeting, the Special Committee reviewed a memorandum, prepared by staff, relating to the privacy of child victims of crimes (Memo No. 1), and current administrative rules relating to the regulation of amateur boxing. The Special Committee also reviewed and took action on preliminary draft proposals relating to the revision of the following criminal statutes: child enticement; incest; sexual intercourse with a child age 16 or over; sex organ exposure; harmful materials exposure; contributing to the delinquency of a minor; abduction; presence of a child on certain premises; child abandonment; unauthorized placement for adoption; distribution of controlled substances; receiving stolen property; and custody interference.

The Special Committee also took action to approve a motion relating to a recommendation for a general obscenity statute.

At the January 21, 1987 meeting, the Special Committee reviewed and took action on preliminary draft proposals revising current statutes relating to: sexual exploitation of children; dangerous weapon possession and transfer; concealing the death of a child; employment of minors; pupil discrimination; infant blindness; and use of lead-bearing paints.

The Special Committee also adopted recommendations which did not take the form of draft legislation, but directed appropriate legislative standing committees and other entities to develop legislation relating to a definition of "sexual contact" in the sexual assault statute; a penalty enhancer for certain controlled substances; and privacy protection for child victims.

At this meeting, the Special Committee also adopted a recommendation that the preliminary draft proposals, as revised to reflect previous Special Committee action, be incorporated into a single draft proposal for recommendation to the Legislative Council. The Special Committee also directed that the draft legislation reorganize various statutes in the Criminal Code relating to crimes against children, as revised by the Special Committee, into a separate chapter of the Criminal Code relating to crimes against children.

C. COMMITTEE AND COUNCIL VOTES

At its meeting on January 21, 1987, the Special Committee on Crimes Against Children recommended that the Legislative Council introduce legislation (WLCS: 246/1) creating a separate chapter in the Criminal Code for crimes against children which contains: (1) all of the crimes related to children in the current Criminal Code, as revised by the Special Committee; (2) new crimes relating to children, as created by the Special Committee; and (3) a statutory provision listing those crimes against children not included in the Criminal Code chapter. The recommendation was adopted by the Special Committee by a unanimous voice vote.

At its March 25, 1987 meeting, the Legislative Council voted to introduce the proposal in the 1987 Legislative Session by a vote of Ayes, 17 (Speaker Loftus; Sen. Risser; Reps. Nelsen, Bell, Bradley, M. Coggs, Hauke, McEssy, Prosser, Schneider and Tesmer; Sens. Davis, Engeleiter, Lee, Moen, Norquist and Strohl); Noes, 0; and Absent 4, (Rep. Clarenbach; and Sens. George, Harsdorf and Kreul).

The proposal was introduced on April 15, 1987 as 1987 Senate Bill 203.

D. STAFF MATERIALS

The Appendix lists all materials received by the Special Committee. Of particular interest are the six discussion papers, which contain a comprehensive discussion of current statutes relating to crimes against children, including relevant court decisions and other interpretations and suggestions for statutory revisions responsive to issues associated with these statutes.

PART III

DESCRIPTION OF 1987 SENATE BILL 203

A. BACKGROUND

In response to a letter from Senator Barbara Ulichny, dated February 12, 1986, the Special Committee on Crimes Against Children was created by the Legislative Council and the Special Committee was directed to examine state laws relating to crimes against children to:

1. Evaluate whether it is advisable to reorganize these laws into a separate chapter of the statutes; and

2. Review these laws to address any major policy issues relating to crimes against children.

In her letter, Senator Ulichny explained that her interest in the review and reorganization of laws relating to crimes against children resulted from the work of the Legislative Council's Special Committee on Sexual Assault and Abuse, which she chaired from August 1980 to January 1983. Following the conclusion of the work of the Special Committee, Senator Ulichny requested the University of Wisconsin-Madison Law School and Extension to review and reorganize the statutes relating to crimes against children, which are scattered throughout the statutes.

In response to Senator Ulichny's request, the Law School undertook a two-year reorganization project which resulted in the preparation of a preliminary draft proposal, entitled, Crimes Against Children: A Proposed Chapter of the Wisconsin Statutes, dated July 1985. The draft proposal was prepared by Attorney Ronni G. Jones, under the supervision of a Law School/Extension faculty advisory committee. The Law School Proposal was used as a resource document by the Special Committee in developing its recommendations.

The Special Committee's deliberations were based on a thorough review of six Legislative Council Staff discussion papers which analyzed the statutes relating to: (1) physical and psychological abuse of children; (2) sexual morality; (3) physical neglect of children; (4) interfering with custody; (5) contributing to delinquency of a minor; and (6) regulatory offenses directed at children. In preparing its recommendations for revisions in these statutes, the Special Committee's general objectives were to:

1. Clarify existing statutory language;

2. Incorporate recent appellate and Supreme Court decisions;

3. Revise penalties to reflect the actual or potential harm to children resulting from criminal conduct; and

4. Develop new prohibitions directed at wrongful conduct against children which is inadequately addressed under current law.

After reaching agreement on its recommendations on statutory changes, the Special Committee decided to recommend consolidation of the statutes located in the Criminal Code relating to crimes against children, into a separate chapter of the Code {ch. 948}. The Special Committee members concluded that a separate chapter accomplishes the objectives of:

1. Emphasizing the seriousness of the offenses against the most vulnerable crime victims in our society;

2. Making the crimes against children easier to locate; and

3. Resulting, in practice, in a more consistent pattern of charging decisions among prosecutors throughout the state.

The Special Committee also recommended changes in various crimes against children which are primarily regulatory offenses. Because the Special Committee decided it was inappropriate to incorporate these types of offenses into the Criminal Code, the Special Committee created a statutory section in new ch. 948 which lists the offenses against children which are located outside the Criminal Code.

B. MAJOR PROVISIONS

1. Child Abuse

a. Child Abuse and Emotional Harm {ss. 948.03 and 948.04}*

The Bill revises the current child abuse statute to prohibit: (a) the intentional or reckless causation of bodily harm to a child; (b) the causation of emotional harm to a child by conduct which demonstrates substantial disregard for the emotional well-being of the child; and (c) the failure by a responsible person to act to prevent bodily or emotional harm to a child.

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*Throughout this Part of the Report, the bracketed statutory references are to the principal statutes revised or created in 1987 Senate Bill 203 which are discussed under a particular subject heading.

Penalties for child abuse under the Bill vary depending on the nature of the offender's actions (e.g., intentional or reckless) and the amount of harm inflicted (i.e., bodily harm or great bodily harm). A penalty enhancement provision in the Bill allows for up to five years additional imprisonment if the abuse is committed by a parent or other person responsible for a child's welfare.

The current criminal child abuse statute is directed at a person who "tortures a child or subjects a child to cruel maltreatment." The statute does not define the key terms "tortures" or "cruel maltreatment" but does contain examples of the types of injuries that are encompassed by these terms. Although this listing of injuries appears to limit the scope of the statute to physical injuries, the statute has been construed by the Court of Appeals as also including forms of abuse which do not result in physical injuries {State v. Campbell, 102 Wis. 2d 243, 306 N.W. 2d 272 (Ct. Apps. 1981)}.

The Special Committee determined that it was unreasonable to rely on court construction to clarify the meaning and scope of the child abuse statute. Therefore, the revised child abuse statute contained in the Bill replaces the terms "tortures" and "cruel maltreatment" with the terms "bodily harm" and "great bodily harm" and defines these terms. The Bill recognizes a distinction between bodily harm and great bodily harm by language which prohibits the intentional or reckless causation of bodily harm by conduct which creates a high probability of great bodily harm.

The Bill also defines the term "emotional harm" for purposes of the separate child abuse statute, created in the Bill, dealing with the causation of emotional harm to a child. The definition of emotional harm is similar to the definition of "emotional damage" contained in the abused or neglected children reporting law {current s. 48.981, Stats.}.

The Bill also revises the child abuse statute to apply to any victim under 18 years of age. Current law applies only to victims under 16 years of age. The Special Committee determined there was no justification for the age limitation in the current statute. By use of the definition of "child" in the definitional section of the Bill {s. 948.01}, the Special Committee has standardized the age category of persons to whom the crimes against children chapter of the Criminal Code is applicable. "Child" is defined under the Bill as a person who has not attained the age of 18 years. However, special age categories are retained for certain offenses.

b. Child Abuse Examinations

In conjunction with the revision of the crime of child abuse, the Bill repeals s. 972.16, Stats., relating to commitment of a person convicted of child abuse to a presentence social and psychological examination. Based on data received from the Department of Health and Social Services (DHSS), which disclosed that the special examination

provision has been used only 10 times since its enactment in 1978, the Special Committee determined that retention of the statute was not warranted. The Special Committee was also concerned that the statute potentially conflicted with the felony sentencing guidelines system currently in effect.

c. Discipline of Children [s. 939.45 (5)]

The Bill revises the current statute recognizing a privilege to discipline children as a defense to the crime of child abuse, as well as other crimes against children. As revised, the privilege may be claimed when the act is committed as reasonable discipline of the child by the child's parent or other person responsible for the child's welfare. The Bill specifies that: (a) "reasonable discipline" includes only such force as a reasonable person believes is necessary; and (b) it is never reasonable discipline to use force intended to cause great bodily harm or death or which would create an unreasonable risk of great bodily harm or death to a child.

The Special Committee recommended revising the current defense provision because the language of the current statute is silent on the nature and degree of force constituting reasonable discipline. The current statute recognizes the privilege simply by stating that "reasonable discipline of a minor by his parent or a person in place of the parent" is privileged conduct. Under the revised statute, discipline is only reasonable if a reasonable person would believe the conduct is reasonable discipline; thus, the disciplinary act is judged by an objective standard.

2. Sexual Offenses

a. Sexual Assault [s. 948.02]

The Bill revises current provisions of the sexual assault statute relating to child victims of assault to clarify the age categories of victims to which the special provisions apply. Specifically, the Bill restates the maximum age for first-degree sexual assault, where consent is not an issue, to apply to victims "who have not attained the age of 13 years." The current age category is "12 years of age or younger."

The Special Committee proposed this change because of the concern that the current age category may be interpreted to apply to a person who has reached, but has not gone beyond, his or her 12th birthday, or may be interpreted to apply to a victim who has not reached his or her 13th birthday.

The Bill also deletes the minimum age for second-degree sexual assault (currently 12 years of age) so that an offender who has sexual

intercourse or sexual contact with a child who has not attained the age of 12 years can be charged with either first- or second-degree sexual assault. This change is intended to afford the district attorney greater flexibility in his or her charging decision.

The Bill creates a new provision in the sexual assault statute that recognizes that a person responsible for the welfare of a child, as defined in s. 948.01 (5) of the Bill, has a duty to protect that child from sexual assault by others. Under this provision, a parent or other responsible person is guilty of a felony if that person is aware of a possible assault on the child and, although capable of doing so, fails to take action to prevent it.

b. Sexual Exploitation (ss. 948.05 and 948.12)

The Bill expands the scope of the current sexual exploitation of children statute to prohibit the possession of a film, photograph, videotape or other pictorial reproduction of the child engaged in sexually-explicit conduct. This change reflects recent decisions of the U.S. Supreme Court which support the view that a prohibition against the possession of child pornography represents a constitutionally-permissible restriction on First Amendment rights (see, in particular, New York v. Ferber, 458 U.S. 747, 102, 3348 (S. Ct. 1982)). It is the position of the Special Committee that a prohibition against possession is necessary because child pornography is commonly subject to noncommercial exchange between pedophiles and other users of this material.

The Bill deletes the "knowledge of the age of the child" element of the crime of sexual exploitation of a child, except for the crime of possession. The Bill recognizes that "reasonable cause to believe that the child was 18 years of age or older" is an affirmative defense. As an affirmative defense, the defendant has the burden of raising and proving the defense by evidence that is clear, satisfactory and convincing.

c. Incest (s. 948.06)

The current incest statute prohibits marriage or acts of sexual intercourse only between persons related by blood nearer in degree than second cousins, regardless of age. The Bill expands the current incest statute to include, where child victims are involved, relation by adoption, in addition to the current provision applying to relation by blood. The Bill also expands the statute to include sexual contact, in addition to sexual intercourse, where a child is involved. The Bill also creates a "failure to act" provision, which subjects a parent or other person who is responsible for a child's welfare, as defined in s. 948.01 (5) of the Bill, to criminal liability for the failure to take action to prevent incest from occurring or being repeated, if such person is capable of taking preventive action.

In developing this recommendation, the Special Committee was aware that other states, such as Minnesota, currently have laws which cover incestual relationships between persons related other than by blood and prohibit both sexual contact and intercourse.

d. Enticement [s. 948.07]

Under the current child enticement statute, there are two elements to the crime: (1) the enticement of a minor under age 18 into a vehicle, room or secluded place; and (2) the intent to commit a crime against sexual morality. The terms "enticement" and "crimes against sexual morality" are not defined in the statutes, but have been construed by Wisconsin appellate courts.

Rather than relying solely on present court construction, the Bill deletes the current ambiguous statutory language which refers to "intent to commit a crime against sexual morality." The Bill substitutes a specific list of intended unlawful purposes, in the enticement statute, such as having sexual contact, including sexual intercourse, with a child or taking sexually-explicit pictures of a child. The Special Committee determined that this specificity should help remove the ambiguity that currently exists in the statute. Listing in the statutes the specific "intended unlawful purposes" is consistent with the Court of Appeals' decision in State v. Morrow, 95 Wis. 2d 595, 291 N.W. 2d 298 (Ct. Apps. 1980), where the Court held that intent to commit a "crime against sexual morality" is not just limited to an intent to commit one of the crimes listed in present ch. 944, crimes against morality.

In revising the child enticement statute, the Bill also removes the age limitation applicable to offenders under current law. This present age limitation provides that only persons 18 years of age or older may be charged with and convicted of enticing a child. The Special Committee determined that removing the age 18 limitation, from the criminal child enticement statute, would grant prosecutors more discretion in determining how to proceed with juveniles. That is, under the Bill, juveniles (persons under age 18) may be found delinquent by the court under the Children's Code [ch. 48, Stats.] or waived into criminal courts and prosecuted as adults for the commission of the crime of child enticement.

e. Sexual Intercourse [s. 948.09]

The Bill combines current statutory provisions prohibiting fornication (involving vulvar penetration) and sexual gratification (involving other types of sexual intercourse) with a 16- or 17-year old into a single statutory provision relating to sexual intercourse involving a child age 16 or 17.

f. Sex Organ Exposure [s. 948.10]

The Bill creates a new crime prohibiting a person from exposing a sex organ to a child, or causing a child to expose a sex organ, for the purpose of sexual arousal or gratification. Unlike the current lewd and lascivious behavior statute [s. 944.20], which is unaffected by the Bill, there is no requirement under the new statute that the act be done publicly or indecently. The new crime is punishable as a Class A misdemeanor, which is the same penalty applicable currently to the crime of lewd and lascivious behavior (a fine not to exceed $10,000 or imprisonment not to exceed nine months, or both).

3. Adult Responsibilities

a. Harmful Material Exposure [s. 948.11]

The Bill revises the current crime of exposing minors to harmful materials by creating two penalty levels for the crime: (1) a Class E felony to transfer harmful material to a child; and (2) a Class A misdemeanor to possess material which is harmful to children, with the intent of transferring the material to a child. Under current law, it is a Class A misdemeanor to transfer harmful material to a child, but it is not a crime to possess harmful material with intent to transfer the material to a child. A Class E felony is punishable by a fine not to exceed $10,000 or imprisonment not to exceed two years, or both. A Class A misdemeanor is punishable by a fine not to exceed $10,000 or imprisonment not to exceed nine months, or both.

The Bill substitutes a new criterion for determining whether the material is harmful to children. Under the Bill, material is harmful to children if, among other things, it lacks serious literary, artistic, political, scientific or educational value for children, when taken as a whole. This standard is consistent with the language suggested by the U.S. Supreme Court in Miller v. California, 413 U.S. 15 (1973), in determining whether material is obscene. The Bill incorporates language from the current crime comics statute [s. 947.08] which is repealed by the Bill. This language adds "physical torture or brutality" to the current language describing the types of conduct depicted in material which may be harmful to children.

The Bill also repeals the requirement under the current statute for obtaining a civil declaratory judgment regarding the harmful nature of specific material prior to a criminal action for exposing minors to harmful materials. The Special Committee determined that this procedure did not enhance enforcement of the statute and there was little support by district attorneys for its retention. Under the Bill, a criminal action may be brought immediately against a person who has transferred to a child material alleged to be harmful to a child. The issue of whether the

material in question is harmful becomes an element of the offense to be proven by the prosecution during the criminal trial.

b. Abandonment [s. 948.20]

The Bill makes the abandonment of a child statute applicable to all children, rather than applicable only to children under the age of six years, as under current law.

c. Failure to Support [s. 948.22]

The Bill specifies that a defendant, who raises an affirmative defense to a failure to support violation, has the burden of proving the defense by evidence that is clear, satisfactory and convincing. This is the same proof standard applicable to the affirmative defenses recognized in the child sexual exploitation statute and the exposing a child to harmful material statute.

d. Concealing Death of a Child [s. 948.23]

Currently, a "woman" is prohibited from concealing the corpse of any issue of her body with intent to prevent a determination of whether it was born dead or alive. The Bill expands this prohibition against concealing the death of a child to apply to any person. A violation of this prohibition is a Class E felony (punishable by a fine not to exceed $10,000 or imprisonment not to exceed two years, or both).

e. Unauthorized Placement for Adoption [s. 948.24]

The Bill increases the penalty for the crime of unauthorized placement of a child for adoption from a Class E felony (punishable by a fine not to exceed $10,000 or imprisonment not to exceed two years, or both) to a Class D felony (punishable by a fine not to exceed $10,000 or imprisonment not to exceed five years, or both).

f. Contributing to Delinquency or Neglect [s. 948.40]

For purposes of clarity, the Bill separates the crime of contributing to delinquency of a child from the crime of contributing to the neglect of a child (both offenses are covered under the current statute) [s. 947.15].

The Bill revises the penalties in the current statute to: (1) impose a higher penalty if the delinquent act contributed to would have been a felony, if the child were an adult; and (2) increase the current penalty where death is a result of contributing to the neglect or delinquency of a child.

The Bill expressly states that a person responsible for the welfare of a child, as defined in s. 948.01 (5) of the Bill, may contribute to the

neglect or delinquency of the child by his or her failure to take action, as well as by his or her actions.

g. Dangerous Weapon Possession and Transfer [ss. 948.60 and 948.61]

The Bill expands the scope of the current prohibition against the possession of a pistol by or transfer of a pistol to a child [s. 941.22] to apply to certain other dangerous weapons, in addition to pistols (e.g., martial arts weapons). Several exceptions contained in the current statute are retained and new exceptions are recognized in the Bill.

Also, the Bill creates a new crime which prohibits any person from knowingly possessing or going armed with a dangerous weapon, including any firearm and certain specified marital arts weapons, on school premises. A number of exceptions to the new prohibition are contained in the Bill. These exceptions permit the possession or use of dangerous weapons on school premises for school-sanctioned purposes (e.g., instructional courses in the use of a weapon) and other appropriate purposes, including authorized hunting on school premises.

h. Receiving Stolen Property [s. 948.62]

The Bill increases the penalty for the receipt of stolen property from a child where the property is valued at more than $500, but not more than $2,500. The penalty is raised from a Class E felony (punishable by a fine not to exceed $10,000 or imprisonment not to exceed two years, or both) to a Class D felony (punishable by a fine not to exceed $10,000 or imprisonment not to exceed five years, or both). The Bill also creates a provision establishing that proof of certain specific facts relating to the value of the property and lack of consent to delivery of the property by the person responsible for a child's welfare is prima facie evidence of a violation.

i. Controlled Substance Distribution [s. 161.49]

Under the Bill, a person who delivers controlled substances near school premises to a person who is under 18 years of age or at least three years younger than the defendant, is subject to the same penalty enhancement provision that is currently applicable to the delivery of cocaine near a school building. The enhancement provision permits the court to increase an offender's prison term by up to five years.

4. Abduction and Custody

a. Abduction [s. 948.30]

Under the current abduction statute, the prosecution is required to prove that the person taking or detaining a child is doing so for an

immoral purpose. The Bill deletes the requirement of proof of an immoral purpose and requires proof only that the defendant had an unlawful purpose.

The current statute applies to any person who abducts a child, including a parent who abducts his or her children. The Bill specifies that the abduction prohibition applies only to a person who abducts a child who is not his or her own child by birth or adoption. In the Special Committee's view, limiting the statute in this way recognizes that there are other statutory provisions which more appropriately deal with a parent who takes or conceals his or her child from the other parent or other legal custodian of the child [i.e., s. 948.31, relating to custody interference by parents and others].

The Bill also creates two levels of penalties for abduction, based on whether force or threat of imminent force is an element of the crime.

b. Custody Interference [s. 948.31]

The Bill makes the following changes in the interfering with custody statute:

(i) Makes all offenses specified in the statute applicable to any child victim under 18 years of age. Under current law, some offenses apply only to children under the age of 14.

(ii) Eliminates the requirement under several provisions in the current statute that the child must be taken or enticed outside of the state before a custody interference violation can occur.

(iii) As revised in the Bill, the new statute recognizes an additional defense to criminal liability for a custody interference violation for a parent who takes a child in order to protect the child from sexual assault. Currently, and under the Bill, the parent is permitted to take the child in order to protect the child from "imminent physical harm."

(iv) Creates a provision permitting the court to order a person convicted of a custody interference offense to reimburse any expenses incurred by the other parent or any state or local government agency in locating and returning a child who was unlawfully taken or concealed. Current law does not specify who is to pay these expenses.

(v) Permits a law enforcement officer to take a child into custody if there is probable cause to believe that the child is in danger of being a victim of a custody interference offense [s. 48.19 (1) (d) 7 of the Bill]. Under current law [s. 48.19], the child may be taken into custody by a law enforcement officer for various reasons (e.g., if the officer believes that the child is in immediate danger from his or her

surroundings and removal is necessary). However, the current law does not recognize the authority of a law enforcement officer to take a child into custody if the officer believes the child is in danger of being a victim of a custody interference offense. The Bill also permits a child to be held in physical custody for a certain period of time if there is probable cause to believe that the child is in danger of being a victim of a custody interference offense [s. 48.21 (1) (b)].

5. Regulatory Offenses

In order to promote enforcement, the Bill decriminalizes several regulatory offenses and subjects these offenses to a civil forfeiture penalty not to exceed $1,000: (a) first violations of employment regulations relating to minors [ss. 103.29 (1) and (2), 103.30, 103.31 and 103.82 (1) (a) and (3)]; (b) violations of requirements relating to the prevention of infant blindness [s. 146.01 (3)]; and (c) violations of restrictions on the use of lead-bearing paints [s. 151.13 (2)].

The Bill also establishes a civil penalty of a forfeiture not to exceed $1,000 for an intentional violation of the prohibition against public school pupil discrimination [s. 118.13 (4)]. The current statute does not contain a specific penalty for a violation.

In the absence of a specific penalty, a civil forfeiture of up to $200 applies to pupil discrimination under the general penalty provision of the Criminal Code [s. 939.61 (1)], which provides a penalty for an act or omission prohibited by a statute for which no penalty is expressed. The Special Committee viewed the $200 general civil forfeiture provision as an inadequate penalty for pupil discrimination.

6. Limitations [s. 939.74 (2) (c)]

The current general criminal statute of limitations provides that prosecutions for felonies must be commenced within six years and prosecutions for misdemeanors within three years of the illegal conduct. The Special Committee considered these limitations as too restrictive in the case of crimes involving child victims. For this reason, the Bill creates an extended statute of limitations for the following crimes: incest involving child victims; physical child abuse; causing emotional harm to a child; sexual assault of a child; sexual exploitation of a child; and solicitation of a child for prostitution. Under the Bill, criminal prosecution must be brought within six years after the alleged offense or by the time the victim reaches the age of 21, whichever period is longer.

PART IV

OTHER RECOMMENDATIONS

This Part of the Report describes several recommendations of the Special Committee which did not take the form of draft legislation developed by the Committee. In particular, the Special Committee recommended the development of legislation on relevant issues which it concluded were beyond the scope of its study assignment, including revisions in: (a) the general obscenity statute; (b) the definition of "sexual contact" and the penalty for certain controlled substances violations; and (c) privacy protection for child victims.

A. GENERAL OBSCENITY STATUTE

At its January 7, 1987 meeting, the Special Committee adopted a motion regarding a recommendation for a general obscenity statute on a vote of Ayes, 8 (Sen. Ulichny; Reps. Schober, Barrett, Johnsrud, Magnuson and Schmidt; and Public Members Bachman and Spencer); Noes, 6 (Rep. Bell; and Public Members Jones, Moeser, Meyer Ruf, Schrag and Ward); and Absent, 2 (Rep. Schneider; and Sen. Helbach). [Public Member Crawford is not recorded, since he had resigned from the Special Committee before this meeting was held.]

At its January 21, 1987 meeting, the Special Committee adopted, on a voice vote, a motion recommending to the Legislative Council, the leadership of the Senate and Assembly, the chairpersons of the appropriate standing committees of the Senate and Assembly and the Co-Chairpersons of the Joint Committee on Finance that the Wisconsin State Legislature enact a criminal obscenity statute that comports with constitutional parameters as expressed by the U.S. Supreme Court in Miller v. California, 413 U.S. 15 (1973). The Committee further recommended that any criminal obscenity statute enacted by the Legislature protect the special interests of children which have been recognized by the Special Committee on Crimes Against Children.

B. DEFINITION OF "SEXUAL CONTACT" AND PENALTY FOR CONTROLLED SUBSTANCES VIOLATIONS

At its January 21, 1987 meeting, the Special Committee adopted, on a voice vote, a motion recommending to the chairpersons of the appropriate standing committees of the Senate and Assembly that the standing committees consider:

1. Whether the definition of "sexual contact" in the sexual assault statute should be amended to delete the phrase "or if the touching contains elements of actual or attempted battery under s. 940.19 (1)."

2. Whether the penalty provisions in the Controlled Substances Act {ch. 161, Stats.} should be amended to subject violators who deliver any controlled substance to a person under 18 years of age, who is at least three years his or her junior, to the same penalty enhancer as is currently applicable to the delivery of cocaine or ecgonine to a person (i.e., mandatory doubling of the minimum and maximum fine and imprisonment for the offense). {Also, the Special Committee referred this issue to the Citizens Council on Alcohol and Drug Abuse for its consideration.}

C. PRIVACY PROTECTION FOR CHILD VICTIMS

At its meeting on January 21, 1987, the Special Committee adopted, on a voice vote, a motion recommending that the Wisconsin Crime Victims Council consider whether any changes are necessary in the current law to provide stronger privacy protection for child victims of crimes.

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APPENDIX

COMMITTEE MATERIALS

Staff Materials

1. Information Memorandum 86-20, Background Information on Crimes Against Children Study (July 17, 1986).

2. Discussion Paper 86-1A, Crimes Against Children: A. Physical and Psychological Abuse (July 17, 1986).

3. Discussion Paper 86-1B, Crimes Against Children: B. Sexual Morality (August 15, 1986).

4. Discussion Paper 86-1C, Crimes Against Children: C. Physical Neglect (September 4, 1986; Revised September 16, 1986).

5. Discussion Paper 86-1D, Crimes Against Children: D. Interfering With Custody (September 29, 1986).

6. Discussion Paper 86-1E, Crimes Against Children: E. Contributing to Delinquency of a Minor (October 2, 1986).

7. Discussion Paper 86-1F, Crimes Against Children: F. Regulatory Offenses Directed at Children (November 5, 1986).

8. MEMO NO. 1, Privacy of Child Victims of Crimes (December 30, 1986).

Other Materials

1. Preliminary Draft Proposal, Crimes Against Children: A Proposed Chapter of the Wisconsin Statutes, prepared by Attorney Ronni G. Jones, University of Wisconsin Law School and Extension (July 1985).

2. Letter and attachments from Attorney General Bronson C. La Follette, relating to obscenity (October 6, 1986).

3. Informational Bulletin 86-1B-2, Regulation of Pornography: Striking a Balance Among Competing Interests, Legislative Reference Bureau (April 1986).

4. Memorandum, "General and Affirmative Criminal Defenses," prepared by Daniel R. Moeser, Circuit Judge (November 7, 1986).

5. Letter from Elaine Olson, Executive Director, Child Abuse/Neglect Prevention Board, relating to privilege to discipline children (December 16, 1986).

6. Administrative rules relating to the regulation of amateur boxing {chs. RL 100 to 105, Wis. Adm. Code}.